Supreme Court, U.S.
FILED

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No. -

In The
Supreme Court of the United States

MICHAEL CYGAN,
Petitioner

v.

MICHIGAN DEPARTMENT OF TREASURY
Respondent

On Petition for Writ of Certiorari
To the United States Supreme Court

PETITION FOR WRIT OF CERTIORARI

ROBERT J. ZINKEL, JR.
Counsel for Petitioner
Zinkel & Associates, P.C.
255 E. Brown Street, Suite 320
Birmingham, MI 48009
(248) 644-5800

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QUESTIONS PRESENTED

The Michigan Tax Tribunal ruled that an employee could be held liable for a corporation's unpaid payroll tax liability pursuant to MCLA 205.27a(5). Petitioner contends that the Tax Tribunal erred as a matter of law in ruling that he was strictly liable for the corporation's failure to pay payroll taxes. The Michigan Court of Appeals ruled that the Tax Tribunal did in fact commit error in applying the law to Petitioner's set of facts and circumstances; however, the Court ruled that it was harmless error, hence, it did not reverse the Tax Tribunal's ruling.

I. **DID THE TAX TRIBUNAL ERR WHEN IT RULED THAT THE MICHIGAN STATUTE IMPOSED STRICT LIABILITY ON ALL "OFFICERS" FOR UNPAID TAX LIABILITIES AND THAT THE MERE SIGNATURE ON AN UNRELATED TAX RETURN FOR A YEAR PRIOR TO PETITIONER'S REPLACEMENT BY MR. MANCINA MADE AN INDIVIDUAL STRICTLY LIABLE FOR THE INTENTIONAL, KNOWINGLY WRONGFUL CONDUCT OF THE OWNER OF THE CORPORATION THAT WAS COMPLETELY CONTROLLED BY THE OWNER AND CONCEALED IN AN UNDETECTABLE FASHION FROM ALL OTHERS?**

II. **DID THE TAX TRIBUNAL, MICHIGAN COURT OF APPEALS AND MICHIGAN SUPREME COURT ERR AS A MATTER OF LAW BY FAILING TO APPLY THE LAW AS SET FORTH BY BEDIKIAN v. DEPARTMENT OF TREASURY, MTT DOCKET NO. 104045 (1991), AND THAT ONLY CORPORATE OFFICERS WITH CONTROL AND RESPONSIBILITY OVER THE PAYROLL FUNCTION CAN BE HELD LIABLE FOR THE CORPORATION'S UNPAID PAYROLL TAXES?**

III. **IS THE APPLICATION OF MCLA 205.27a UNCONSTITUTIONAL AS APPLIED BY THE TAX TRIBUNAL AS A VIOLATION OF DUE PROCESS BY HOLDING A PERSON RESPONSIBLE FOR THE WILFUL CONDUCT OF ANOTHER?**

IV. DID THE MICHIGAN SUPREME COURT ERR WHEN THEY RULED THAT THE SIGNATURE ON A RETURN OTHER THAN THE PAYROLL TAX RETURNS IMPOSES LIABILITY RATHER THAN A REBUTTABLE PRESUMPTION?

V. DID THE MICHIGAN SUPREME COURT ERR WHEN THEY RULED THAT THE TRIBUNAL IMPROPERLY IMPOSED THE STANDARD OF STRICT LIABILITY BUT THE IMPROPER APPLICATION OF THE LAW BY THE TRIBUNAL WAS HARMLESS ERROR RATHER THAN REVERSIBLE ERROR?

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SUMMARY OF CASE

Michael Cygan petitions this Court for relief from being found to be personally responsible for unpaid payroll taxes by Dynaplast Corporation. The assessment was made under a Michigan statute, Michigan Compiled Laws Annotated §205.27(a) which creates a rebuttable presumption that officers of a Michigan corporation are presumed to be personally responsible for the corporation's unpaid taxes. At trial before the Michigan Tax Tribunal Mr. Cygan contends that he successfully rebutted the presumption imposed by the statute when he showed that he was not an officer at the time the corporation stopped paying its payroll taxes and that the reason the taxes were not paid was that the president of the company took over control of the company and intentionally stopped paying payroll and falsified the financial records of the company to reflect the payments were made in order to create the illusion that the company was in a much better financial position in order to sell the financially troubled company.

The Trial Court ruled that the Michigan statute imposed "strict liability" on the officer of the company even under the circumstance when the failure to pay the taxes was the result of an undisclosed willful conspiracy on the part of Dynaplast's president and the scheme was a totally undetectable deliberate plan to defraud lending institutions into investing into the troubled company based upon the false financial information. The Michigan Court of Appeals held that the Trial Court improperly imposed the higher standard of "strict liability" but ruled that the misapplication of the law was merely "harmless error." The decision was appealed from the Michigan Court of Appeals to the Michigan Supreme Court which denied Mr. Cygan's application "because we are not persuaded that the questions presented should be reviewed by this Court." Accordingly, Mr. Cygan files this Petition for reconsideration of the decision.

Michael Cygan was an employee of Dynaplast, a corporation which admittedly failed to collect and remit payroll taxes to the State of Michigan. Both the Internal Revenue Service and the State of Michigan assessed penalties against Dynaplast. Mr. Elms the President and sole living shareholder of Dynaplast, chose not

to pay the taxes beginning in the summer of 1988. Dynaplast was in serious financial trouble and Dynaplast hired a man by the name of Anthony Mancina to oversee the operations of Dynaplast. Mr. Elms demoted Mr. Cygan and replaced him with Mr. Mancina who specialized in consulting with financially troubled businesses. Mr. Mancina was known as a "turn around specialist."

Mr. Elms made three decisions in 1988 which exonerate Mr. Cygan from being liable for Dynaplast's unpaid tax liability under Michigan law. The first, and most important decision, was Mr. Elm's secret decision to stop collecting and remitting payroll taxes to the State of Michigan and Internal Revenue Service. Mr. Elms was the officer in sole control of the payroll function and he alone made the decision to stop paying payroll taxes. In addition, Mr. Elms, in conjunction with Mr. Mancina, altered the books and records to appear as if the payroll taxes were fully paid and current, and totally concealed the fact that payroll taxes were, in fact, in arrears. Mr. Elms and Mr. Mancina had located a buyer for the business and engaged in this fraud to improve Dynaplast's Balance sheet and Income Statement to entice the buyer to acquire the Company. Part of the Sales Agreement was that the buyer was to assume Dynaplast's payroll tax liability.

Under Michigan law the transferee of a corporation assumes any unpaid tax liabilities. Neither the buyer, Mr. Elms, or Mr. Mancina were assessed for the unpaid liability that was concealed from Mr. Cygan and the buyer in an active and intentional fraud.

The only person who stood to benefit from this fraud was Mr. Elms. According to Mr. Elms' plan, he intended to shift the responsibility for payment of the payroll taxes from him to the new buyer by surreptitiously altering the financial records which would directly insulate Mr. Elms from paying the payroll tax liability and increase his net worth by a corresponding amount in excess of $217,000.00.

The Trial Court and Court of Appeals committed error by ruling that Mr. Cygan was "strictly liable" for Mr. Elm's conduct even though it was Mr. Elm's sole decision to stop paying the State of Michigan and to actively conceal this fact in the books and records and financial statements of Dynaplast. It is undisputed,

that Mr. Elms active fraud was totally undetectable by Mr. Cygan, or any other person for that matter and the only person who stood to benefit from the fraud solely was Mr. Elms when he sold the company and the hidden payroll tax liability to the unsuspecting buyer.

Mr. Cygan respectfully submits that reversible error by the Trial Court and Court of Appeals in ruling that Mr. Cygan was strictly liable for the active and intentional wrongful fraud committed by Mr. Elms that was intentionally concealed by Mr. Elms from all mankind in a scheme to defraud the buyer of Dynaplast. Mr. Cygan respectfully contends that the statute only creates a rebuttable presumption, not strict liability, that a purported officer of the company is responsible for a company's failure to make necessary payroll tax liabilities and that he successfully rebutted the presumption by demonstrating that Mr. Elms intentionally took total and exclusive control of the payroll function and circulated false financial information that the taxes were paid. This fraud was totally undetectable and was the result of the intentional and willful conduct of Mr. Elms.

Mr. Elms made a second decision that was totally omitted from consideration by the Trial Court. That was that Mr. Cygan was removed from a position of authority during the period in question and no evidence to dispute this fact was ever introduced for the period in question. Although Mr. Cygan signed a tax return as "secretary" in 1987 it is was undisputed that he was never truly elected or appointed as an officer of Dynaplast and as of the beginning of 1988, Mr. Cygan **was removed from any position of authority and control** as a purported officer of the company. More importantly Mr. Cygan never had any control over the payroll function **during the period in question** . Rather the trial court treated Mr. Cygan as an officer and person with control over the payroll function during the period of time even though all evidence showed Mr. Elms stripped Mr. Cygan of any authority and he alone controlled the payroll function. This evidence was uncontroverted at trial.

Although Mr. Cygan was never actually elected as an officer of the corporation and only signed the 1987 Single Business Tax return as such for the administrative convenience of Mr. Elms; for

the sake of argument, even if Mr. Cygan was an officer in 1987, he was removed from a position of authority during the period in question in 1988 by Mr. Elms. Mr. Elms replaced Mr. Cygan with Mr. Mancina before he engaged in the scheme to stop paying the State of Michigan and to alter the financial records to cover up the fraud.

Mr. Elms made three key decisions in early 1988 which totally exculpate Mr. Cygan as a person responsible for the corporate tax liability. These factors were never considered and were totally ignored by the Trial Court. Subsequently, the Michigan Court of Appeals found the Trial Court erred, but held the Trial Court's errors were "harmless" and affirmed the decision. These erroneous applications of the law to the factual scenario overlooked by the Trial Court, and later affirmed by the Michigan Court of Appeals, were, in fact, harmful errors and were clearly erroneous. Accordingly, the failure of the Michigan Court of Appeals to identify the reversible error committed by the Trial Court constitutes palpable error and forms the basis of this Petition for Writ of Certiorari.

The third decision made by Mr. Elms was in effect for all the years before this Court; namely, at all times, Mr. Elms maintained exclusive control over the payroll function and Mr. Cygan in his entire tenure at Dynaplast, never had control over the payroll reporting function or disbursement function. It is undisputed that at all times, Ken DiLaura signed all payroll tax returns, submitted them directly to Mr. Elms, and it was within Mr. Elms sole discretion to determine whether the State of Michigan was paid or not. The payroll function was always reserved to Mr. Elms' exclusive domain. Never at any time was Mr. Cygan involved. The Court of Appeals committed palpable error in ruling that Mr. Cygan had supervisory control over the payroll function. This conclusion is contrary to the undisputed facts that Mr. Cygan had absolutely no involvement with the payroll reporting or disbursement function. It is very important to recognize that Respondent never offered even one mere scrap or scintilla of evidence that anyone other than Mr. Elms had sole and exclusive supervisory control over the payroll function.

The Court of Appeals committed palpable error in mischaracterizing Petitioner's argument as "Plaintiff argues that the tribunal erred in holding him derivatively liable for the unpaid taxes because defendant presented no evidence to support the tribunal's finding that plaintiff had control and responsibility over the payment of the corporation's withholding taxes." Petitioner's position is not that Respondent was required to prove Mr. Cygan had control over the payroll function to make his case. Instead, this misconstruction of Petitioner's argument is twofold. Not only did Petitioner prove he had no control over the payroll function, Respondent failed to offer any evidence to dispute the clear testimony at trial that only Mr. Elms had complete, total, and exclusive control over the payroll function. Thus, the evidence is undisputed in two ways. First, Mr. Cygan never had supervisory control over the payroll function and secondly, Mr. Elms was the only person with exclusive control over the payroll function. These evidentiary findings are undisputed.

FACTS

This is an appeal from a decision by the Michigan Tax Tribunal filed August 2, 1995 and a subsequent denial of a request for reconsideration was entered January 26, 1996. The decision was upheld by the Michigan Court of Appeals and the Michigan Supreme Court denied any further consideration of the matter. The decision held that Michael Cygan is liable for a corporation's failure to pay withheld payroll taxes and seeks to collect Dynaplast's unpaid payroll tax liability from a former employee, Michael W. Cygan, the Petitioner. *Cygan v. Department of Treasury, M.T.T. Docket No. 135625 (1995).* Petitioner Michael Cygan respectfully contends the decision was erroneous for a number of reasons as more fully set forth herein and that he should not be held liable. The Tax Tribunal ruled as follows:

> The Tribunal finds that statute before us [MCLA 205.27a] imposes a type of strict liability where intent of the party is not a consideration. The facts indicate that:

1) Petitioner supervised the making of the tax return [Single Business Tax] and the submission of the return for payment to the owner;

2) The owner, Frank Elms, had complete control over issuance of payments by the corporation, including tax payments such as those that are the subject matter of this case; and

3) Petitioner was aware that the tax had not ultimately been paid by Frank Elms. The Tribunal, applying MCLA 205.27a to this set of facts, even with no intent established on the part of Petitioner, must find Petitioner liable. *Opinion Pg. 3-4.*

Mr. Cygan does not appeal the following portion of the Tax Tribunal's decision absolving him of any liability for the penalty imposed on the corporation:

> The Tribunal also finds that it must inquire into the facts relevant to Petitioner to determine if the penalty is appropriately assessed, pursuant to *Stackpoole v Treasury Department*, 194 Mich App 112; 486 NW2d 322 (1992). Substantially similar to the case at hand, in *Stackpoole*, the Michigan Court of Appeals remanded the case to the Tribunal to determine if a penalty could be charged against a corporate officer under Michigan's corporate officer liability statute. The Tribunal looks at many factors to determine if a penalty is appropriately assessed. In the case at bar, the Tribunal finds the Petitioner is not liable for the penalty charged and bases its decision upon the fact that Petitioner: 1) had no intent not to pay the tax; and 2) had no knowledge that the payment of the tax was not in fact made.*Opinion Pg. 4-5.*

Finally, Mr. Cygan seeks de novo review that MCLA 205.27a is unconstitutional as applied in this case for the reason that the Tax Tribunal ruled it did not have jurisdiction to rule on a purely constitutional issue.

> Petitioner next contends that the lack of an intent requirements in MCL 205.27(a) is unconstitutional. Following

> the Michigan Supreme Court decision in *Wickman* v *Novi*, 413 Mich 617, 647; 322 NW2d 103 (1982), the Tax Tribunal may decide constitutional issues where the "claim is merely an assertion, in constitutional terms, that the assessment was arbitrary and without foundation." The Tribunal may not, however, decide "purely constitutional" questions which are not within the expertise of the Tribunal. *Henshaw* v *State Tax Commission*, 126 Mich App 806; 338 Nw2d 224 (1983). Petitioner has presented a purely constitutional question pertaining to his due process rights. The Tax Tribunal finds that it has completed its determinations on the tax issues within its sphere of expertise and may not decide Petitioner's purely constitutional issue presented. *Opinion Pg. 4.*

Michael Cygan was employed by Dynaplast corporation from 1985 until May of 1989. Mr. Cygan was listed as a Secretary of the Corporation on the Michigan Annual Report for the year 1987; however, he had no authority to act independently or to make business decisions without the consent of E. Frank Elms, the president, CEO and majority shareholder. Ken DiLaura was in charge of the payroll department and Mr. Cygan was not responsible for preparing and/or filing payroll tax returns. *Cygan TR. Pg. 49-51; DiLaura TR. Pg. 112.*[1] Further, even if Mr. Cygan had such authority, he was clearly relieved of any such authority in July of 1988 when he was replaced by Anthony Mancina.

The Michigan Department of Treasury (Department) contends that Mr. Cygan was an officer of the company because he was listed on the Michigan Annual Report for 1987 as the corporation's Secretary and that he signed a 1987 Single Business Tax return as Vice President of Finance. It is uncontroverted that Mr. Cygan was not truly the Vice President of Finance of the corporation at any time nor did Mr. Elms ever appoint him secretary nor are there any minutes or other documents to support that he was an officer of the company; rather, Mr. Cygan was listed as secretary on the Michigan Annual Report for ministerial convenience. *Cygan TR. Pg. 71.*

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[1] All references to the trial transcript are designated as TR.

Anthony Mancina began advising Mr. Elms regarding the business operations of Dynaplast in July of 1988. Mr. Elms retained Mr. Mancina, who specialized in advising financially troubled businesses, to run Dynaplast's business operations. It was Messrs. Elms' and Mancina's plan to improve Dynaplast's balance sheet and then sell the company. *Cygan TR. Pg. 52-56.*

In order to improve Dynaplast's financial situation, it was Mr. Mancina's recommendation that all the cash flow of Dynaplast's operations be directed to its suppliers in order to improve Dynaplast's balance sheet and help ensure that Dynaplast would not lose its Chrysler contracts. Thus, based on Mr. Mancina's advice, Mr. Elms knowingly and willfully withheld payment of payroll taxes from the State of Michigan and the Internal Revenue Service. *Cygan TR. Pg. 52-56.*

Mr. Elms was the President and controlling shareholder of Dynaplast from 1987 until he sold the business in 1989. *Cygan TR. Pg. 92-93; Respondent Exhibit 2.* Mr. Elms completely controlled all of Dynaplast's daily operations. *Cygan TR. Pg. 63-64; DiLaura TR. Pg. 113-114.* Mr. Elms had sole authority to make decisions regarding Dynaplast's day-to-day business operations. No other person at Dynaplast was able to make business decisions independently of Mr. Elms. Mr. Elms had ultimate supervisory control and authority over all business functions, including payroll. *Cygan TR. Pg. 63-64; DiLaura TR. Pg. 113-114.*

Mr. Elms was the sole signatory over Dynaplast's bank account. *Cygan TR. Pg. 56; DiLaura TR. Pg. 119.* Michael Cygan never had control over the disbursement function at Dynaplast. All disbursements were completely and totally controlled by Mr. Elms. *Cygan TR. Pg. 64.* Mr. Cygan could not control whether the State of Michigan got paid or not

The payroll function of Dynaplast was completely controlled by Ken DiLaura. *Cygan TR. Pg. 49-51; DiLaura TR. Pg. 123.* During 1988, Mr. DiLaura's title was Accounting Manager and he alone had complete control over the payroll function. *Cygan TR. Pg. 49-51; DiLaura TR. Pg. 112 & 123.* Mr. DiLaura testified that he prepared and filed all payroll tax returns during the time period

in question. Indeed, at trial, Cathy Warren from the Department of Treasury testified that Ken DiLaura signed the Sales Use and Withholding Tax Returns for the quarters at issue. *Warren TR. Pg. 132.*

Ken DiLaura's duty was to complete the payroll tax returns and fill out a check request form for the payroll tax to be remitted to the State of Michigan. *DiLaura TR. Pg. 113-114.* Once the task was complete he would then forward the check to Frank Elms for his signature. It was Mr. Elms' policy to prefer paying creditors, other than the State of Michigan and the Internal Revenue Service, in order to pay his suppliers and keep production going. *DiLaura TR. Pg. 114.* Mr. Elms would not take phone calls from creditors. Mr. Elms directed Mr. Cygan and Mr. DiLaura to serve as an intermediary or "buffer" and advise him which suppliers were complaining the most for payment or which suppliers needed to be paid to prevent shipments of production supplies and materials to Dynaplast from being cut-off. *Cygan TR. Pg. 49-50; DiLaura TR. Pg. 125*

In late October of 1988, Ken DiLaura discovered that checks made payable to the State of Michigan for the quarters at issue had not cleared the bank and remained on the outstanding check list. Ken DiLaura asked Michael Cygan if he knew why payroll tax checks sent to the State of Michigan had not cleared. Mr. Cygan was totally unaware that the checks had not cleared. They both asked Mr. Elms if he was holding the payroll tax checks. Mr. Elms responded affirmatively, stating that he and Mr. Mancina found it necessary to pay the suppliers before the State of Michigan and the Internal Revenue Service, but that he intended to send the payments to the taxing authorities at a later date when cash flow improved. *Cygan TR. Pg. 49-51; DiLaura TR. Pg. 120*

Mr. Elms was aware he could become personally liable to the taxing authorities if payments were not made, and advised Mr. Cygan and Mr. DiLaura not to worry. Mr. Elms insisted that he intended to make payments to the taxing authorities, but he just wanted to delay making payments to the taxing authorities until cash flow improved at a later date. Mr. Elms also advised that this was the recommendation of Anthony Mancina, a business

consultant retained by Dynaplast to assist in resolving its financial woes. *Cygan TR. Pg. 53-56.*

Mr. Elms would also hold checks payable to other creditors until circumstances made it absolutely necessary to release the check. Mr. Cygan had absolutely no control or supervisory power over the disbursement function. The supervision, control and authority of the disbursement function were the sole domain of Frank Elms. *Cygan TR. Pg. 49-50; DiLaura TR. Pg. 114-119; Opinion Pg. 2. Mr. Mancina also indicated that he did not intend to pay any taxing authority and intended to use all cash to enhance the business operations. Cygan TR. Pg. 49-50; DiLaura TR. Pg. 114-119.*

It is also important to note the Mr. Elms and Mr. Mancina knew that checks they held were actually "posted" to the financial statements as if they had been paid, but in reality they had not left the premises. It is very important to understand that the computer generated check is assigned an account number and is "posted" to the books and records of the corporation when it is generated. Thus, the accounting system reflects the check as being paid ("posted") when it is generated rather than when it is actually mailed. The reliability and accuracy of the system and financial statements are premised on the concept that checks are mailed when they are generated because checks that are not mailed, appear to be mailed and paid on the financial statements. *Cygan TR. Pg. 105.*

Ken DiLaura resigned in December of 1988, and Mr. Cygan was told by Mr. Mancina and Mr. Elms to reconcile Dynaplast's accounts payable and payroll taxes, which until his resignation, had been Mr. DiLaura's responsibility. Mr. Cygan was overwhelmed by the task and as a result, he contacted Ken Chupinski of the accounting firm of Price Waterhouse to reconstruct Dynaplast's financial information and to specifically determine Dynaplast's accounts payroll and payable tax liabilities inclusive of penalties and interest. Upon Mr. Chupinski's arrival, he began a preliminary examination of the payroll tax accounts and could not determine whether the liabilities were accurate. He then thought that he needed to contact the taxing authorities directly to determine the liability. *Cygan TR. Pg. 68.*

Mr. Cygan requested that Mr. Mancina and/or Mr. Elms execute a Power of Attorney authorizing Mr. Chupinski to act as Dynaplast's representative, which they refused to do. Mr. Chupinski corroborated that no power of attorney could be executed without Mr. Elm's consent and that Mr Cygan did not have the authority to execute a power of attorney or to cause a power of attorney to be executed on behalf of Dynaplast without the permission of Mr. Elms. *Cygan TR. Pg. 69; Chupinski TR. Pg. 69.*

Further, Mr. Cygan was instructed not to meddle in any payroll tax issues; all they cared about was receiving a number that was roughly accurate; that they had no interest in working out a deal with the taxing authorities; nor did they care to seek to reduce the liability. Mr. Cygan then told Mr. Chupinski that he had no authority to permit Mr. Chupinski to act on behalf of Dynaplast, that Mr. Mancina and Mr. Elms did not want Mr. Chupinski to represent Dynaplast nor to contact any governmental agency. Accordingly, a Power of Attorney was never filed. *Chupinski TR. Pg. 69; Cygan TR. Pg. 57-59.*

Eventually a buyer was found, Plastech Engineered Products, Inc. ("Plastech"), who became aware that Dynaplast was past due in its payroll tax payments. Mr. Mancina, Mr. Elms and Julie Brown, President of Plastech, the Buyer, collectively decided not to pay the past due payroll taxes out of business income, but rather agreed to pay the past due taxes out of the sales proceeds when Julie Brown/Plastech acquired the company. *Cygan TR. Pg. 49 & 60.* However, the financial condition of the business was so grave the sale was never consummated and Dynaplast filed for bankruptcy.

Plastech ultimately bought some of the assets out of the bankruptcy proceeding for mere pennies on the dollar. The Company was liquidated pursuant to Chapter 7 of the Bankruptcy Code, In Re: Dynaplast, Case No. 89-036096. In 1987, Dynaplast began experiencing severe financial problems. Dynaplast was seriously in arrears with its creditors. During this period of time, Dynaplast had several major contracts with Chrysler Corporation. Dynaplast's suppliers were withholding supplies and materials

because Dynaplast was behind in making payment for production supplies and materials. For this reason, Dynaplast was in serious jeopardy of losing its Chrysler contracts.

After Dynaplast was liquidated, the Company's books and records were destroyed. The only records available were those retained by the State of Michigan or individual witnesses prior to the destruction of the records. At the time the Company was liquidated, Dynaplast allegedly owed the State of Michigan as follows:

Assessment #	Tax
D697798	$ 28,078.72
D685147	33,341.91
D651217	39,538.72
D609920	33,620.21
D586668	659.28
	$135,238.84

The State of Michigan seeks to collect the aforementioned assessments from Mr. Cygan. The State of Michigan has not substantiated the amounts of the assessments claiming the amounts were obtained from filed returns, yet no such returns were introduced into evidence. The amounts of the assessments were accepted as true over objection without introduction of any evidence to support the assessment.

Mr. Cygan also raised an objection as to the propriety of the assessments in the pretrial statement as being unconstitutional since the assessments were made against the Corporation and not him and were re-assessed against him without any recourse on his part to contest the amount of the assessments and also that the statute is unconstitutional on the basis that the statute holds him liable for the willful and intentional acts of another person.

ARGUMENT

I. THE LOWER COURT ERRED AS A MATTER OF LAW WHEN IT RULED THAT CORPORATE OFFICERS WERE STRICTLY LIABLE FOR A CORPORATION'S FAILURE TO WITHHOLD AND REMIT PAYROLL – TAXES

In this case the lower court made the factual determinations that

> 3. Petitioner, [Mr. Cygan] did not control the mailing or sign corporate checks for Dynaplast Corporation.
>
> 4. E.Frank Elms was the president and seventy-one percent shareholder of Dynaplast's Corporation from 1987 until the sale of Dynaplast Corporation in 1989. Mr. Elms was the only individual with check signing authority and had the final authority of who the corporation ultimately paid, including the payment of taxes. *Opinion Pg. 2.*

Based on these findings of fact, its very obvious that Mr. Cygan did not have control or responsibility for the payment of payroll taxes. Nevertheless, the Tax Tribunal did not correctly apply the law. Under MCLA 205.27a only an officer with responsibility and control for the payment of payroll taxes is liable for the corporation's failure to pay, and if an officer does not have responsibility and control for payroll taxes the officer would not be liable for the corporation's failure to pay.

The Tax Tribunal totally ignored that Ken DiLaura was the person responsible for preparing payroll tax returns and the returns were ultimately submitted to Mr. Elms for payment. The Tax Tribunal ruled that the fact that Mr. Cygan signed a 1987 Single Business Tax return at the direction of Mr. Elms makes him strictly liable for the corporation's unpaid payroll taxes. Instead, the Tax Tribunal ruled that Mr. Cygan was strictly liable for the unpaid payroll taxes:

> The Tribunal finds that the statute before us MCLA 205.27a imposes a type of **strict liability** with the intent of the party is not a consideration. The facts indicate that:

1) Petitioner supervised the makings of the tax return [single business tax] and the submission of the return for payment to the owner;

2) The owner, Frank Elms, had **complete control** over issuance of payments by the corporation, **including tax payments such as those that are the subject matter of this case**;

3) **Petitioner was unaware** in that the tax had not been openly paid by Mr. Elms. The Tribunal, applying MCL 205.27(a) to this set of facts, even with no intent to establish on part of petitioner, must find petitioner liable. *Opinion Pg. 3-4. (Emphasis added).*

No where in the statute does any such language exist:

> If a corporation liable for taxes administered under this act fails for any reason to file the required returns or to pay the tax due, any of its officers having control or supervision of, or charged with the responsibility for, making the returns or payments is personally liable for the failure. The signature of any corporate officers on returns or negotiable instruments submitted in payment of taxes is **prima facie evidence** of their responsibility for making the returns and payments. The dissolution of a corporation does not discharge an officer's liability for a prior failure of the corporation to make a return or remit the tax due. The sum due for a liability may be assessed and collected under the related sections of this act. MCLA 207.27a.

The plain language of MCLA 205.27a(5) does not hold an officer strictly liable for payment of a corporation's payroll taxes but rather creates a rebuttable presumption that an officer of a corporation who signs a payroll tax return has the requisite control and responsibility for filing and paying the corporation's payroll tax. The Tax Tribunal erroneously interprets the language that creates a rebuttable presumption as imposing strict liability. That ruling was clearly erroneous. It is clear under the statute that an officer may provide evidence to rebut the presumption that he did

not have the requisite responsibility or control to be held liable under MCLA 205.27a.

The Tax Tribunal erred as a matter of law in ruling that the signature on any tax return or corporate document which identifies an individual as a corporate officer, whether he truly is or not, becomes strictly liable for the corporation's unpaid tax liabilities. Clearly this is not the correct application of the law. Rather, "it is well settled that a rebuttable presumption makes out of prima facie case and casts that burden of proof on the opposing party." In re: Mid America Management Corporation v. Department of Treasury, 153 Mich. App. 446, 465; 395 N.W.2d 702 (1986).

In this case the State of Michigan submitted absolutely no evidence that Mr. Cygan actually had the responsibility and control over the payroll tax function. Rather, the only evidence the Department put on was that Mr. Cygan signed a Michigan Annual Report and a Michigan Single Business Tax Return. The Department did not show any payroll tax returns signed by Mr. Cygan nor did the Department submit any evidence to support its assessments. The only additional evidence other than the documents Mr. Cygan signed, was the oral testimony of Cathi Warren, Supervisor of the Sales, Use, Withholding Tax Division for the Michigan Department of Treasury. She testified that Ken DiLaura and not Mr. Cygan signed the payroll tax returns in question. *Warren TR. Pg. 132 Line 7.* At this point in time the Department was apparently satisfied it had enough evidence to establish a prima facie case whereby Mr. Cygan had to rebut the presumption that he had control and responsibility over the payroll function.

The Department put on no evidence that Mr. Cygan had actual control and responsibility over the payroll function. The Department failed to introduce **any evidence relating to the tax year 1988** or to refute or contradict any evidence introduced by the Petitioner or his witnesses. The only evidence introduced by the Department pertained to time periods other than the period in question and merely demonstrated that Mr. Cygan signed a single business tax return and Michigan Annual Report. Mr. Cygan then put on substantial and significant evidence to

rebut this presumption and by clearly convincing evidence, proved that he had neither the control nor responsibility over the payroll function. *Arguendo*, even if Mr.Cygan had a limited supervisory duty to review the payroll tax return preparation process, as was incorrectly alleged by the Department, which he did not, he nevertheless did not have control and responsibility over this function which was ultimately in the hands of Mr. Elms.

It was Mr. Elms who received the check request from Mr. DiLaura. It was Mr. Elms who controlled the disbursements. However, it is clear from the testimony of Ken DiLaura that he alone prepared the payroll tax returns, figured out the amount that was due to be paid, submitted the returns with a check request to Beverly Dailey for Mr. Elms signature. *DiLaura TR. Pg. 112-113.* Mr. Cygan did have supervisory authority over Mr. DiLaura in other areas, but he had nothing to do with supervising the payroll function. The payroll function was not an area Mr. Cygan supervised and the Department's own witness testified that Mr. DiLaura signed the returns. *Warren Pg. 132.* There is not one scintilla of evidence that Mr. Cygan signed a payroll tax return or in any way supervised the payroll function

All evidence is to the contrary. At no point in time did Michael Cygan have the authority, control or supervisory power over the payroll tax function or the ultimate decision making authority. It was Mr. Elms and Mr. Mancina who intentionally withheld payment of payroll taxes to the State of Michigan. Not only did Mr. Cygan clearly rebut the presumption that he did not have control or responsibility, the Tax Tribunal found that Mr. Cygan did not have control over the mailing or signing corporate checks issued by Dynaplast Corporation, and that Mr. Elms was the only individual with check signing authority and had the final authority as to who was ultimately paid, including the payment of taxes. *Opinion Pg. 2.*

By the court's own ruling in considering the evidence on a whole, the Tax Tribunal's findings of fact show Mr. Cygan rebutted the presumption he was the officer responsible and in control of the payroll tax function. The Tax Tribunal conceded that Mr. Cygan did not have the requisite control and responsibility, but

rather held that it was of no consequence because the statute held him strictly liable for the corporation's failure to pay its payroll taxes.

Clearly the presumption that Mr. Cygan had responsibility and control is obviously rebutted in the final words of the Tax Tribunal's Opinion ruling that 1) "the Petitioner [Mr. Cygan] had no intent not to pay the tax; and 2) had no knowledge that payment of tax was not in fact made". *Opinion Pg.* 5. Further, the Department failed to introduce into evidence the basis for the alleged assessments. There were no computations, no assessments, no payroll tax returns, just the bold unsubstantiated assertion that the amounts sought to be collected were correct.

The facts of this case are undisputed. Although the records of Dynaplast were destroyed, the testimony of independent former employees, or professionals formerly hired by Dynaplast, clearly showed that at all times, Mr. Elms, President of Dynaplast, completely controlled the disbursement function of his wholly owned company and he alone, or later with the participation of Anthony Mancina, decided not to remit payroll taxes to the State of Michigan for the specific periods in question.

Further, the testimony of Mr. DiLaura and Mr. Cygan remains undisputed and without contradiction that Mr. Elms had total control and authority over the payroll function and willfully caused payroll taxes not to be remitted to the State of Michigan and that Mr. DiLaura submitted all payroll information and check requests to Mr. Elms.

Even if Mr. Cygan had reviewed the financial statements, books and records and payroll tax returns, an arrearage for payroll taxes would not appear because Mr. Elms and/or Mr. Mancina held the checks from the face of the financial statements. It would appear that they were, in fact, paid. Thus, Mr. Cygan could not detect that Mr. Elms was withholding payroll tax payments from the face of the financial statements because Mr. Elms and Mancina knowingly, willfully and undetectably undermined the integrity of the financial statements and accounting system to create the illusion that the company's financial condition was improving. According to the financial statements, Dynaplast was

current in its payroll tax liabilities as the statements were prepared on the presumption that all checks issued were mailed rather than being held by Mr. Elms. Indeed the Tax Tribunal held that Mr. Cygan had no knowledge that checks were held. *Opinion Pg. 5.*

After Ken DiLaura left in December of 1988, Mr. Mancina told Mr. Cygan to determine what was actually outstanding for accounts payable and payroll taxes. The task was so overwhelming that he asked a representative from the accounting firm of Price Waterhouse to analyze the payroll taxes to determine what was due and owing, inclusive of penalties and interest, and also to try and get penalties waived. The representative from Price Waterhouse, Ken Chupinski, testified that Mr. Elms refused to execute the Power of Attorney and instructed that the taxing authorities not be contacted because they did not want them to be alerted to the existence of the liabilities which could, in turn, interfere with the sale of the business. Mr. Mancina and Mr. Elms felt if taxing authorities were to levy on assets or upon receivables, the sale would not go through. Mr. Chupinski testified that Mr. Cygan did not have the authority or supervisory power over the payroll function.

Pursuant to the clear language of MCLA §205.27a, Mr. Cygan was not an officer with supervisory authority or control over the payroll tax preparation, filing of the payroll tax returns or disbursement function, and clearly the section does not operate to impose liability on Mr. Cygan during the period in question. It is important to note the Mr. Cygan presented the same issues to a federal court and prevailed on summary judgment. *Petitioner Exhibit 6.*

II. THE LOWER COURT'S RULING CONTROVERTS ESTABLISHED CASE LAW HOLDING THAT OFFICERS WITHOUT THE RESPONSIBILITY AND CONTROL OF THE TAX FUNCTION CANNOT BE HELD LIABLE FOR A CORPORATION'S FAILURE TO PAY TAXES

This is not a case of first impression, but rather a complete deviation from established case law. In a remarkably similar case, *Bedikian v. Michigan Tax Tribunal*, M.T.T. Docket No. 104045 (1991), the application of MCLA§ 205.27a(5) was addressed as to an officer who does not have control or responsibility of the payroll function. That case involves the same relationship between the owner Mr. Posnik, and Bedikian the controller and secretary, as existed between Mr. Elms as owner, and Mr. Cygan as secretary. Like the instant case, Ralph Posnik was the controlling shareholder of MTC, as well as its president and CEO. The court in *Bedikian found*:

> Bedikian, a CPA, first was employed by MTC in September, 1979 as corporate controller. His duties included supervision of the accounting department, preparation of statements required by the Michigan Public Service and Interstate Commerce Commissions, compilation of corporate financial statements, and review of corporate tax returns. Bedikian was not personally responsible for the preparation of required tax returns, but delegated this task to someone under his supervision, the head accountant in the payroll department. At no time has Bedikian owned any shares of MTC stock. *Bedikian Pg. 5-6.*

Similarly, Bedikian's role as an officer and director was merely for the convenience of the owner and he had no real control, power or decision making authority over corporate operations:

> Bedikian testified that his appointment came about primarily to fulfill MTC's need for someone to witness formal corporate documents. In consideration of his nomination corporate secretary, Bedikian received no increase in work duties, no

shares of corporate stock, no salary increase, and no recognition as a director of the corporation. Bedikian stated that although informal officer's meetings were held from time to time, usually at an attorney's office, he attended only periodically upon invitation, and then primarily for the purpose of providing financial information. *Bedikian Pg. 6-7.*

Bedikian possessed no authority at any time to write checks, to pay MTC's supplies/creditors. Prior to approximately 1980, MTC required that all corporate checks be signed by two officers, Boyd Cline and George Peck. Subsequently, a check-writing machine stamped the name of treasurer Shirley Posnik on issued checks. Testimony received at the hearing established that the check-writing machine was jealously guarded by Ralph Posnik's administrative assistant/executive secretary Doris Wagner. Wagner reserved the machine in her office, maintained a lot of issued checks, and safeguarded the key needed to operate the machine either in her desk when she was present, or locked in a company safe while she was away. Bedikian never personally used the check—writing machine. None of the sales or withholding tax payments forwarded to the department in behalf of MTC bore Bedikian's signature, nor did Bedikian sign any of the sales/withholding returns filed by MTC for the taxable periods [*8] in issue. *Bedikian Pg. 5-8.*

It is important to note that the court in Bedikian made the distinction that Mr. Bedikian was merely performing ministerial tasks rather that exercising true control as a corporate officer. Mr. Bedikian, under the title of a corporate officer, signed many more documents than Mr. Cygan did, while in fact he was merely performing ministerial tasks. Mr. Bedikian signed and/or filed a number of returns. These documents include the following:

(1) 1983 and 1984 Michigan Annual Reports which list Bedikian as secretary;

(2) a partial payment agreement with the department relative to MTC's delinquent tax obligations dated 2/18/83 signed by Bedikian in his capacity as secretary; diesel motor fuel tax license applications for years ending 12/31/84

> and 12/31/85 signed by Bedikian as secretary; a sales/withholding return for the period November, 1984 relating to a different business signed by Bedikian; sales/withholding returns for the periods December, 1981, January, 1982, February, 1982 and November, 1984 for MTC signed by Bedikian as controller; various items of correspondence with employees of the department for periods outside of the taxable period in issue, signed variously as controller and corporate secretary; and copies of three IRS forms for 1981, 1982, and 1983 to extend time to file corporate income tax returns signed by Bedikian as secretary. *Bedikian Pg. 9.*

The Tax Tribunal failed to make such a distinction. Clearly Mr. Bedikian filed infinitely more documents and tax returns as a corporate officer than Mr. Cygan did, but the court focused on the control issues as being determinative rather than the signature "Ralph Posnik as calling the shots relative to the financial affairs of the company," and thus applied the proper standard in determining which officer had responsibility and control over the corporation rather than applying the erroneous standard in this case, that merely signing a non-payroll tax return ipso facto makes a corporate officer strictly liable for the corporation's failure to pay taxes.

Again it is imperative to recognize that the Bedikian Court focused on the fact that Mr. Bedikian lacked the authority to pay tax liabilities independent of Posnik's consent. Obviously, the Tax Tribunal totally misconstrued MCLA 205.27a(5) when it failed to look at which officer had responsibility and control for payment of taxes. If the standard of merely signing a return holds an officer strictly liable for a corporation's failure to comply with the laws of Michigan, Bedikian clearly would have been found liable under this misconstrued application of law.

Under federal law the counterpart to MCLA 205.27a(5) is IRC Sec. 6672 (the one hundred percent penalty). In this case Mr. Cygan was absolved of liability under IRS Sec. 6672. *Plaintiff Exhibit P-6*. Such was also the case in Bedikian when the court considered in its analysis whether Mr. Bedikian had the requisite

responsibility and control, and so noted that the Internal Revenue Service already determined, for federal tax purposes, that he was not the responsible party. *Bedikian Pg. 13*. Again, this is further evidence to be considered by the court in determining the responsibility and control under Michigan law.

The Bedikian Court focused on whether the officer rebutted the presumption that he had responsibility and control, and found the presumption was rebutted and did not affix liability on the corporate officer:

> Kathleen McKendry, a ten-year employee of MTC and, aside from Doris Wagner, the only other member of the company's clerical staff, characterized Ralph Posnik as "calling the shots" relative to the financial affairs of the company.
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> Ceresa [a general ledger accountant at MTC] testified that Posnik reviewed creditor information and directed Doris Wagner to draft whatever checks he saw fit to issue. The witness stated that Posnik was fully aware of problems the corporation had with its tax payments, but that he elected to defer payment to the Department to satisfy more immediate concerns. Ceresa knew of Bedikian's frustration with the fact that the corporation's taxes had not been paid and recalled that Bedikian expressed dissatisfaction with the entire operation because of Posnik's sustained policy of diverting tax monies for other purposes. Ceresa confirmed that Bedikian lacked the authority to pay tax liabilities independent of Posnik's consent.
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> Bedikian testified that Posnik was aware that his withholding and sales tax obligations were in arrears. Twice Bedikian negotiated payment plans with the department on behalf of the corporation at Posnik's direction.
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> As MTC's business crumbled, Bedikian found himself in the awkward position of having to juggle creditor communications without concurrently possessing any authority to

> determine which creditors would be paid; the latter function resided solely within the discretion of Posnik, who, Bedikian testified, became more intensely involved with the corporation's financial problems as the situation worsened. Bedikian stated that he regularly submitted a computerized listing of accounts payable to Posnik, who then orally designated which accounts were to paid. *Bedikian Pg. 9-12.*

The court in Bedikian then determined that, under facts and circumstances identical to Mr. Cygan's case, an officer who lacks the requisite control and responsibility and whose standing as a corporate officer is titular at best, cannot be held liable for the corporation's tax liability:

> First, from the perspective of corporate control, Bedikian's participation in the corporate enterprise was not sufficiently "tax-intensive" to expose him to corporate officer liability. To be sure, the record does not paint Bedikian as some sort of corporate bystander wholly lacking in knowledge of or input into the daily operational and financial concerns of MTC. As controller of the corporation, it goes without saying that Bedikian possessed an intimate awareness of internal affairs and exercised a quantum of authority within the corporate ranks; however, in large part his participation in corporate doings flowed from his position as controller, and not as corporate secretary. Indeed, Bedikian's corporate office appears to have been titular only, for he persuasively testified that he was nominated corporate secretary only to facilitate the execution of corporate documents and was regularly excluded from officers' meetings. Credible testimony received in this case is replete with references to the unfettered control over daily operations exercised by MTC's owner and president, Ralph Posnik, to the exclusion of Bedikian. It was Posnik who wielded absolute authority over the manner in which the corporation was to be operated and Posnik alone who wielded absolute authority over the manner in which the corporation was to be operated and Posnik alone who designated which creditors were worthy of payment from available funds.

* * *

Because he did not possess the authority to sign, or even cause to be signed, MTC's checks, and accordingly could neither compel the payment of taxes, influence the priority of payments nor control expenditures, Bedikian cannot be held liable for the corporation's nonpayment of taxes.

* * *

The decision to exonerate Bedikian because he lacked check-writing authority fully comports with the theory which underlies the legislative decision to impose liability upon responsible corporate officers, that is, that those persons through whom the corporation acts, and who are in a position to make or forward payment to the government, should be deemed liable for their failure carry out this obligation. Accordingly, persons such as Bedikian who, despite their corporate office, are powerless to make or direct payment to the proper authorities, should not be responsible for corporate tax breaches. The facts outlined in this matter clearly disclose that Bedikian at no time possessed the power, either singly or in combination with another officer, to override Posnik's dictates and divert corporate funds toward the payment of tax obligations.

Although some of the proposed exhibits amassed by the department as support for its assessments appear to be similar to documents recognized in Michigan cases as supportive of corporate officer liability, the asserted documentation — had it been admitted as part for the department's case at the hearing — would have been insufficient to overcome the clear indication, garnered from the record that Bedikian is not liable for the corporation's tax debts as a corporate officer. In this regard, it is interesting that a significant portion of the documents which the Department stated on its list of proposed exhibits is generic in nature (e.g., the Michigan Annual Reports), relates to taxes not in issue (e.g., the November, 1984 return), relates to taxable periods not before the Tribunal (e.g. sales/withholding returns for 1981 and 1982), or discloses

the signatory's capacity as controller, and not as corporate secretary. *Bedikian Pg. 18-20.*

What is also interesting to note in the Bedikian decision is that many of the documents that were offered by the Department were generic in nature or relating to taxes not at issue, such as the Michigan Annual Report or a Motor Fuel Tax document. The court also noted that many of the documents related to taxable periods not before the Tribunal, such as sales and withholding returns for 1981 and 1982. The Bedikian Court obviously made the distinction that the officers signature on documents and tax returns other than the ones at issue should not be considered in assessing liability. *Bedikian Pg. 20-21*

In this case there is no evidence that Mr.Cygan signed a payroll tax return and the Department's own witness testified to the contrary; that in fact, Ken DiLaura signed the withholding tax return. On this basis, applying the analysis utilized by Bedikian to this case, Mr. Cygan did not even have to overcome the rebuttable presumption because there is no evidence he signed a payroll tax return. The Bedikian Court made this distinction very clear because Mr. Bedikian was assessed for the corporation's failure to pay sales and use tax; however, even though the Department produced sales and use tax returns with Mr. Bedikian's signature on them, they were for prior years and not the years in question.

The court observed that Mr. Bedikian would have to have signed the sales and use tax returns for the years in question. *Bedikian Pg. 20.* In the instant case Mr. Cygan, unlike Mr. Bedikian, never signed returns for the underlying taxes at issue. The court was very clear that the corporate officers signature on generic documents or tax returns outside of the period in question, or for taxes that were not at issue, do not prove that the corporate officer was responsible for yet another tax during a different time frame.

Similarly, Mr. Cygan's signature on a 1987 Single Business Tax return and a Michigan Annual Report does not form evidence that he was prima facie liable for withholding taxes for a different period of time. It is imperative to note that the period at issue is 1988 not 1987. It should also be noted that Mr. Cygan's role as

controller of Dynaplast was taken from him in July of 1988, and that at all times, Mr. Cygan reported to Mr. Elms and that after Anthony Mancina was employed by Dynaplast, he was also subordinate to him. This evidence is uncontroverted and not only rebuts a presumption that he is responsible, if such a presumption exists, but it proves by clear and convincing evidence that Mr. Cygan had absolutely no control or responsibility with respect to payment of payroll taxes of Dynaplast.

III. IT IS UNCONSTITUTIONAL TO HOLD PETITIONER LIABLE FOR THE INTENTIONAL AND WILLFUL CONDUCT OF ANOTHER

It is unconstitutional to hold Petitioner liable for the wrongful acts of another when, in fact, Petitioner was neither knowledgeable of the wrongful conduct, nor did Petitioner have the power or authority to alter Elms' willful conduct. It is well settled law that a statute that holds a person liable for the wrongful conduct of another, without fault on his part, is unconstitutional and invalid, as depriving such owner to his property the due process of law. *Daugherty v. Thomas*, 174 Mich. 371; 140 N.W. 615 (1913); *Accord*, *Manistee Bank & Trust Company v. McGowan*, 394 Mich. 655; 3232 N.W.2d 636 (1975); Const. (1963), Art 1 Sec. 2..

The court in Daugherty, supra, observed and quoted Justice Loomis in the decision of *Camp v. Rogers*, 44 Conn. 291, as follows:

> Indeed, we should have this strange anomaly that, if my neighbor borrows my carriage and is riding in it with his servant, and the latter wilfully neglects to turn to the right and injures a team that he meets, while my neighbor would not be liable as master, because the act of his servant was wilful, I should not yet be liable as owner, and that, too, with no right to indemnity from the master. Such a result is in itself so absurd as to show either that the statute ought not to be so construed as to produce it, or that, if this be a correct construction, it is so far void, either as manifestly against natural justice, or as violating that article of the

> Constitution which forbids the taking away of any person's property 'without due process of law.' If such a law, so construed, were to be held valid, then a law that should by a merely arbitrary rule make one man liable for the debts of another would be valid. Indeed, there is no limit that could be put to the most arbitrary acts of the legislature in making one man liable for the acts of another. Daugherty, 174 Mich. 371 at 380.

The Daugherty Court based its opinion on the cornerstone of constitutional law, *Marbury v. Madison*, observing that statute was enacted that made an automobile owner liable for any injury occasioned by the negligent operation by any person of such motor vehicle whether or not that person had the owner's consent or the owner had knowledge that another person was using his vehicle.

> Chief Justice Marshall said in *Marbury v Madison*, 1 Cranch (U.S.), 137: 'The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty — indeed they are under a solemn duty — to look at the substance of things whenever they enter upon the inquiry whether the legislature had transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relations to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the court to so as judge, and thereby give effect to the Constitution.' The principal constitutional limitations, which are designed to protect private rights, against the arbitrary exercise of governmental power, and which therefore operate to limit and restrain the exercise of police power, are the following: *** (8) No person shall be *** deprived of life, liberty, or property, without due process of law. *** (12) Nor shall any Department deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The court applied the aforementioned analysis to the Michigan statute, which held the owner of an automobile liable for harm or

injury caused by his vehicle when the harm is caused by another person using the vehicle, and ruled that it is unconstitutional for a statute to hold a person liable for the wilful or negligent acts of another.

> The evidence shows neither a malfeasance, a misfeasance, nor a nonfeasance upon his part. The injury to plaintiff does not warrant the imposition of damages upon one who is not shown to have been blamable in the premises.
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> ***
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> To hold subdivision 3 of section 10 constitutional is to hold a party absolutely liable for the negligent conduce of another, a mere stranger or a wilful trespasser, no matter how careful or free from negligence he himself has been. We think that the result of such holding would be to take the property of defendant Thomas to pay for the wrongful and negligent act of another person not sustaining to him the relation of servant, agent, or employe. Such a doctrine seems unnatural and repugnant to the provisions of the Constitution here invoked. We are forced to the conclusion that the provisions of this subdivision are not a necessary regulation in the exercise of the police power; that in and by its terms the plain provisions of the Constitution are violated; and the subdivision must be held unconstitutional, and the statutory liability therein asserted, done away with. Daugherty, 174 Mich 371, 389-390.

It is very clear from the facts of this case that Mr. Elms knowingly and willfully refused to pay the taxing authorities for the State of Michigan and preferred other creditors to the State of Michigan. *Cygan TR. Pg. 54-56.* Any effort to correct the situation was thwarted by Mr. Elms. Mr. Elms refused to permit disbursements to be made to the State of Michigan. Mr. Cygan had no control over disbursements and no knowledge that Mr. Elms was withholding tax payments to the Department. *Opinion Pg. 5.* Mr. Cygan was powerless to control Mr. Elms' willful and intentional actions. To hold Mr. Cygan liable for Mr. Elms' willful conduct is an impermissible violation of the 14th Amendment and the Michigan Constitution as a depravation of property without

due process of law. The statute is clearly unconstitutional as construed because it holds Mr. Cygan liable for the wilful and intentional acts of another to which he has no control.

RELIEF REQUESTED

WHEREFORE, Petitioner, MICHAEL CYGAN, respectfully requests that this Court reverse the decision of the Tax Tribunal and award Mr. Cygan his costs, expenses, and attorney fees. It will not be necessary to remand the case because it is clear from the findings of fact by the Tax Tribunal below that Mr. Cygan certainly did not have the requisite control or authority to hold him liable under MCLA 205.27a(5). Thus the decision should be reversed.

Respectfully submitted,

Robert J. Zinkel, Jr.
Attorney for Petitioner
255 E. Brown Street, Suite 320
Birmingham, MI 48009
(248) 644-5800

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ORDER

Michigan Supreme Court
Lansing, Michigan

Entered: May 26, 1999

MICHAEL WILLIAM CYGAN,
Petitioner-Appellant,

v

DEPARTMENT OF TREASURY,
Respondent-Appellee.

SC: 112568
COA: 192785
LC: MTT No. 00135626

On order of the Court, the delayed application for leave to appeal from the March 13, 1998 decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 26, 1999 /s/ Corbin R. Davis, Clerk

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL WILLIAM CYGAN,	UNPUBLISHED March 13, 1998
Plaintiff-Appellant,	
v	No.192785 Michigan Tax Tribunal
DEPARTMENT OF TREASURY, *Defendant-Appellee.*	LC: No. 00135626

BEFORE: Doctoroff, P.J., and Reilly and Allen*, JJ

PER CURIAM.

Plaintiff appeals as of right from a judgment entered by the Michigan Tax Tribunal holding him derivatively liable for $217,920.54 in unpaid withholding taxes plus interest based on his position as a corporate officer. We affirm.

Plaintiff argues that the tribunal erred in holding him derivatively liable for the unpaid taxes because defendant presented no evidence to support the tribunal's finding that plaintiff had control and responsibility over the payment of the corporation's withholding taxes. MCL 205.27a(5); MSA 7.675(27a)(5) provides in pertinent part:

> If a corporation liable for taxes administered under this act fails for any reason to file the required returns or to pay the tax due, any of its officers having control or supervision of, or charged with the responsibility for, making the returns or payments is personally liable for the failure. The signature of any corporation officers on returns or negotiable instruments submitted in payment of taxes is prima facie evidence of their responsibility for making the returns and payments. [MCL 205.27a(5); MSA 7.675(27a)(5).]

This Court's review of The Tax Tribunal's decision is limited to whether the decision authorized by law and is supported by

competent, material, and substantial evidence on the whole record. *Stackpoole v Dep't of Treasury*, 194 Mich App 112, 114; 486 NW2d 322 (1992).

We conclude that the record supports the tribunal's finding. The record shows that plaintiff served as corporate secretary for the months included in the liability assessment. Further, the record contains two powers of attorney by which plaintiff granted to another corporation employee the power to prepare the withholding taxes for the same period of time. The testimony of this employee indicated that plaintiff was his immediate supervisor within the corporation hierarchy. We conclude that this evidence is competent, material and substantial proof that plaintiff had supervisory authority over the making of the corporation's withholding tax returns for the period at issue.

We reject plaintiff's assertion that the resolution of this issue is governed by *Bedikian v Michigan Tax Tribunal*, 1991 Mich Tax LEXIS 50 (Docket No. 104045, July 10, 1991). The officer liability statute at issue in Bedikian was MCL 206.351(5); MSA 7.557(13351)(5), which bases a finding of officer liability on a showing that the officer in question has "control, supervision of, or [is] charged with the responsibility for making the returns and payments" of the unpaid taxes. Id. (Emphasis added). Conversely, MCL 205.27a(5); MSA 7.675(27a)(5) states that derivative liability may be imposed on any corporation "officers having control or supervision of, or charged with the responsibility for, making the returns or payments." Id. (Emphasis added). In Bedikian, the tribunal specifically noted that it did not read the conjunctive "and" as if it meant "or." Bedikian, supra at *3 n 5.

Plaintiff also argues that the tribunal's holding is based on an erroneous interpretation of MCL 205.27a(5); MSA 7.675(27a)(5). Statutory interpretation is a question of law reviewed de novo on appeal. *People v Hammons, 210 Mich App 554, 557; 534 NW2d 183 (1995).*

Plaintiff first alleges that the tribunal incorrectly found that the statute imposes a type of strict liability. We believe that plaintiff's argument is based on an erroneous reading of the tribunal's opinion. The record indicates that the tribunal was aware that the

statute's signature mechanism establishes only a prima facie case of derivative officer liability. When the tribunal characterized the statute as imposing "a type of strict liability," it was not, as plaintiff suggests, concluding that the signature mechanism establishes liability per se. Rather, the tribunal was simply indicating that plaintiff's state of mind is irrelevant to the resolution of the case. This is in keeping with the precepts of derivative liability, through which a corporate officer is held personally liable based upon the actions of the corporation. See *Keith v Dep't of Treasury*, 165 Mich App 105, 110; 418 NW2d 691 (1987).

Plaintiff next argues that the tribunal erred in finding that an officer's signature on any tax return or corporate document is enough evidence of control to impose liability. We agree that the tribunal did misinterpret the statute in the manner cited by plaintiff. However, that error was harmless given our conclusion that the finding of derivative liability is supported by competent, material and substantial evidence. We initially note that there is an important link between MCL 205.27a(5); MSA 7.675(27a)(5) and the officer liability provisions found in the various taxing statutes. Other than the former officer liability statute found in the Motor Fuel Tax Act, MCL 207.101 et seq.; MSA 7.291 et seq., the specific officer liability statutes found in the various taxing acts have not been repealed. The Michigan Department of Treasury has concluded that the interpretation of those liability statutes should be based on the wording of MCL 205.27a(5); MSA 7.675(27a)(5). RAB 89-38 (April 25, 1989). Specifically, the department reads these other officer liability statutes as supporting a finding of derivative liability where an officer is responsible for making either the returns or payments of the various taxes. We see no reason why we should not defer to this construction of the statute. *James-Jennings v Hutzel Hospital* (On Remand), 223 Mich App 94, 105; 565 NW2d 680 (1997).

To understand how the statute's signature mechanism works in light of the link between MCL 205.27a(5); MSA 7.675(27a)(5) and the various taxing acts, we must first look to the sentence which immediately precedes it in the statute. This sentence begins, "If a person liable for a tax administered under this act. . . ." MCL 205.27a(5); MSA 7.675(27a)(5) (emphasis added).

However, the statute is found among those statutory provisions that establish a revenue division within the Department of Treasury and outline its powers and duties. No specific taxes are administered under these provisions. Given the link between MCL 205.27a(5); MSA 7.675(27a)(5) and the other taxing acts, we conclude that this portion of the statute refers to whatever taxing act is implicated in a given circumstance. See *Altman v Meridian Twp*, 439 Mich 623, 635; 487 NW2d 155 (1992) (Every word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible). Therefore, in order to maintain internal consistency within the statute, we conclude that a corporate officer's signature "on returns or negotiable instruments submitted in payment of taxes" is prima facie evidence of control, responsibility or supervisory authority over the making of only the specific taxes implicated.

The signature mechanism, however, is not the only way a finding of derivative officer liability can be supported. As previously noted, the record does contain competent, material and substantial evidence that plaintiff exercised supervisory authority over the making of the tax returns at issue. Therefore, the tribunal's misreading of MCL 205.27a(5); MSA 7.675(27a)(5) was harmless. MCR 2.613(A).

Finally, plaintiff argues that holding him personally liable for the unpaid taxes violates his due process rights given his lack of knowledge that the corporation was not paying the withholding taxes. We disagree. A statute is presumed constitutional absent a clear showing to the contrary. *Caterpillar, Inc v Dep't of Treasury*, 440 Mich 400, 413; 488 NW2d 182 (1992). The presumption of constitutionality is especially strong with respect to taxing statutes. Id.

> A taxpayer challenging a tax on constitutional grounds must overcome a strong presumption in favor of the taxing statute's validity and point out with specificity the constitutional provision that is violated. A taxing statute must be shown to "'clearly and palpably violate[ ] the fundamental law'" before it will be declared unconstitutional. [Id. at 414-415 (citations omitted).]

Because a rational relationship exists between MCL 205.27a(5); MSA 7.675(27a)(5) and the legitimate state goal of raising revenue, we conclude that holding plaintiff liable under the statute does not violate his rights of due process. *Verbison v Auto Club Ins Ass'n*, 201 Mich App 635, 638; 506 NW2d 920 (1993). The statute imposes personal liability on a corporate officer for unpaid corporate taxes only if the officer holds and exercises authority within the corporation with regard to the taxes at issue. We believe that holding these corporate officers personally liable for unpaid corporate taxes is reasonably related to the legitimate goal of raising revenue. Accordingly, we conclude that plaintiff has failed to show that the statute palpably violates his due process rights.

Affirmed.

/s/ Martin M. Doctoroff

/s/ Glenn S. Allen, Jr.

I concur in result only

/s/ Maureen Pulte Reilly

STATE OF MICHIGAN
MICHIGAN TAX TRIBUNAL

MICHAEL WILLIAM CYGAN,
Petitioner, ,

v

MICHIGAN DEPARTMENT
OF TREASURY,

Respondent..

MTT Docket No. 135626

Tribunal Judge Presiding
Norman D. Shinkle

ORDER DENYING PETITIONER'S MOTION FOR REHEARING

On August 28, 1995 the Tribunal issued an Opinion and Judgment regarding this matter. On September 20, 1995 Petitioner filed a Motion for Rehearing and on October 6, 1995 Respondent filed a Response to Petitioner's Motion for Rehearing.

The Tribunal, having reviewed the file, finds that there were no palpable errors made. Further, Petitioner's arguments for rehearing are based on legal theory and facts that were or should have been argued at the hearing. The Tribunal notes that had Petitioner shown that he was not a responsible party and did not, in fact, have supervisory control over Mr. DiLaura who prepared the tax forms, he would have prevailed.

Petitioner asserts in the motion that DiLaura reported directly to Mr. Elms[1] on tax matters; however, at hearing testimony was given indicating that Mr. Elms and Cygan jointly decided which checks to mail or hold. It was established at the hearing that the assessments at issue covered the time periods of March, April, June, July and August of 1988. As to Petitioner's argument that his power was stripped when Mr. Mancina was retained by Mr. Elms, the Tribunal finds that testimony and written evidence presented at the hearing shows that Mancina took control in October of 1988, indicating that the subject tax was due prior to Mancina

[1] The owner and President of Dynaplast Corporation.

taking control. Petitioner alleges that Mancina took control in the summer of 1988, although evidence was inconclusive to support Petitioner's assertion.

Petitioner also asserts that the wrong statute was applied in this matter. Specifically, Petitioner asserts that MCLA 205.27a(1) should have been the controlling statute in this matter due to the fact that the corporation (Dynaplast) was sold rather than terminated. The Tribunal recognizes that the purchaser of the property may be a responsible party under the statute; however, if the new owner is determined to be a responsible party, the new owner is just one of several responsible parties from which Treasury may attempt to collect.

Therefore, IT IS ORDERED that the request for rehearing is DENIED.

MICHIGAN TAX TRIBUNAL

/s/ Norman D. Shinkle

Entered: Jan 26 1996
/ael

STATE OF MICHIGAN
MICHIGAN TAX TRIBUNAL

Cygan, Michael William,
Petitioner,

v

MTT Docket No. 135626

Michigan Department of Treasury,

Tribunal Judge Presiding
Norman D. Shinkle

Respondent.

OPINION AND JUDGMENT

BACKGROUND

The above captioned case was filed by Petitioner on April 10, 1990. Respondent has assessed has assessed Petitioner as personally liable for withholding taxes due from the Dynaplast Corporation, for the period of March 1988 through August 1988, pursuant to MCL 205.27(a); MSA 7.657(27a). MCL 205.27(a); MSA 7.657(27a) states in pertinent part:

> (5) If a corporation liable for taxes administered under this act fails for any reason to file the required returns or to pay the tax due, any of its officers having control or supervision of, or charged with the responsibility for, making the returns or payments is personally liable for the failure. The signature of any corporate officers on returns or negotiable instruments submitted in payment of taxes is prima facie evidence of their responsibility for making the returns and payments. The dissolution of a corporation does not discharge an officer's liability for a prior failure of the corporation to make a return or remit the tax due. The sum due for a liability may be assessed and collected under the related sections of this act.

The case was heard by Tribunal Judge Norman D. Shinkle on February 22, 1995.

SUMMARY OF ISSUES

1) Was Petitioner an officer having control or supervision of, or charged with the responsibility for, making the returns or payments of the subject corporation, pursuant to MCL 205.27(a)(5)?

2) Is MCL 205.27(a) unconstitutional by imposing liability on persons who have no intent?

FINDINGS OF FACTS

1) Petitioner was listed as Secretary of the Dynaplast Corporation, a Michigan corporation engaged in the manufacturing of automotive components, on the 1988 Michigan Annual Report for Profit Corporations and signed the report as Vice-President of Finance.

2) Petitioner signed the 1987 Dynaplast Corporation single business tax return December 28, 1988, as Vice President.

3) Petitioner did not control the mailing of nor sign corporate checks issued by the Dynaplast Corporation.

4) E. Frank Elms was the president and 71% shareholder of Dynaplast Corporation from 1987 until the sale of Dynaplast Corporation in 1989. Mr. Elms was the only individual with check-signing authority and had the final authority of who the corporation ultimately paid, including the payment of taxes.

5) On October 20, 1988, Petitioner signed a power of attorney authorization, assigning Kenneth DiLaura authorization for the responsibility of the withholding and single business tax for the Dynaplast Corporation. Petitioner signed the authorization as Vice-President of Finance.

6) Petitioner was the supervisor of Kenneth DiLaura. DiLaura signed the sales, use, withholding and single business tax returns for 1988 as Dynaplast's accounting manager.

7) Anthony Mancina was brought in as an advisor to the Dynaplast Corporation in 1988. The formal contract between Dynaplast and Mr. Mancina was negotiated in October 1988.

8) Tax assessment amounts for subject claim:

Assessment #	Tax	Penalty	Interest
D697798	$ 28,098.72		
D685147	33,341.91		
D651217	39,538.72		
D609920	33,620.21		
D586668	659.28		
Totals	$135,258.84	$ 53,905.50	$ 82,661.70
Final Total	$271,826.04		

CONCLUSIONS OF LAW

The facts of this case indicate that Petitioner actually signed the single business tax return for the subject corporation on December 28, 1988 and controlled or supervised Kenneth DiLaura, who signed the 1988 withholding tax return. The Tribunal finds that Petitioner is personally liable under MCl 205.27(a)(5). The fact that other persons may also have been in charge of making the return or paying the tax is no defense to Petitioner's liability. MCL 205.27(a) clearly states that "**ANY** of its officers having control or supervision of, or charged with the responsibility for, making the returns or payments is personally liable for the failure." (Emphasis added).

The Tribunal finds that the statute before us imposes a type of strict liability where intent of the party is not a consideration. The facts indicate that: 1) Petitioner supervised the making of the tax return and the submission of the return for payment to the owner; 2) The owner, Frank Elms, had complete control over issuance of payments by the corporation, including tax payment such as those that are the subject matter of this case; and 3) Petitioner was unaware that the tax had not ultimately been paid by Frank Elms. The Tribunal, applying MCL 205.27(a) to this set of facts, even with no intent established on the part of Petitioner, must find Petitioner liable.

Petitioner next contends that the lack of an intent requirement in MCL 205.27(a) is unconstitutional. Following the Michigan Supreme Court decision in *Wichman* v *Novi*, 413 Mich 617, 647;

222 NW2d 103 (1982), the Tax Tribunal may decide constitutional issues where the "claim is merely an assertion, in constitutional terms, that the assessment was arbitrary and without foundation." The Tribunal may not, however, decide "purely constitutional" questions which are not within the expertise of the Tribunal. *Henshaw* v *State Tax Commission*, 126 Mich App 806; 338 Nw2d 224 (1983). Petitioner has presented a purely constitutional question pertaining to his due process rights. The Tax Tribunal finds that it has completed its determinations on the tax issues within its sphere of expertise and may not decide Petitioner's purely constitutional issue presented.

The Tribunal also finds that it must inquire into the facts relevant to Petitioner to determine if the penalty is appropriately assessed, pursuant to *Stackpoole* v *Treasury Department*, 194 Mich App 112; 486 NW2d 322 (1992). Substantially similar to the case at hand, in Stackpoole, the Michigan Court of Appeals remanded the case to the Tribunal to determine if a penalty could be charged against a corporate officer under Michigan's corporate officer liability statute. The Tribunal looks at many factors to determine if a penalty is appropriately assessed. In the case at bar, the Tribunal finds that Petitioner is not liable for the penalty charged and bases its decision upon the fact that Petitioner: 1) had no intent not to pay the tax; and 2) had no knowledge that the payment of the tax was not in fact made.

JUDGMENT

IT IS ORDERED that Petitioner is responsible for the tax due by Dynaplast Corporation for assessment identification numbers D697798, D685147, D651217, D609920 and D586668 in the amount of $217,920.54.

MICHIGAN TAX TRIBUNAL

By: /s/ Norman D. Shinkle

Entered: Aug 28 1996
/clp